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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 726

FRED CODUTO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petition for Writ of Certiorari

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UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

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Petition for Writ of Certiorari

Petitioner, Fred Coduto, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on November 17, 1960.

Opinions of the Courts Below.

The memorandum opinion of the District Court is unreported and is printed in Appendix I hereto, *infra*, p. 31. The opinion of the Court of Appeals is reported at 284 F. 2d 464 and is printed in Appendix II hereto, *infra*, p. 35.

Statement of Jurisdiction.

The judgment of the Court of Appeals was entered on November 17, 1960. A timely petition for rehearing by the court *en banc* was filed and was denied on January 17, 1961; and was denied as a petition for rehearing on January 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented.

1. Whether, upon the request of the petitioner for access to the grand jury minutes of testimony of the key witness for the government, he was entitled, at least, to have the trial judge inspect them for the purpose of determining whether there was any materially impeaching material contained therein; where the witness was an informer, a convicted narcotics seller, burglar and thief, and who, by the admission of the government's attorney, had lied while giving testimony on cross examination.

2. Whether the petitioner was entitled to a mistrial because of prejudicial newspaper articles published after the jury had been selected; and whether the District Court erred in summarily denying petitioner's motion for mistrial without conducting a *voir dire* examination of the jurors or conducting any sort of inquiry as to whether or not the newspaper articles had had any prejudicial effect upon the jury.

3. Whether the proper standards for the enforcement of the criminal law in federal courts require the reversal of the conviction of the petitioner because of a combination of errors by the trial court which are as follows:

   a. The trial court erred in permitting counsel for the government to cross examine the petitioner concerning his financial affairs, and to present evidence in rebuttal concerning his financial affairs.

b. The prejudicial conduct of the trial court deprived the petitioner of a fair and impartial trial.

c. The trial court erred in refusing to give certain instructions tendered by the petitioner concerning his explanation of alleged flight.

d. The trial court erred in refusing to give an instruction tendered by the petitioner on the law of the defense of alibi, where there was evidence in the record which, if believed by the jury, would tend to prove the defense of alibi.

e. The trial court erred in failing to give an instruction tendered by the petitioner concerning the credibility of the testimony of an informer witness.

4. Whether the sentence of forty years imposed upon the petitioner, a man of previous good reputation in the community for being a peaceable and lawabiding citizen, was excessive and requires this court in the exercise of its supervisory power over the administration of justice in the federal courts to set aside the sentence.

Rule Involved.

Federal Rules of Criminal Procedure, Rule 6(e):

> (e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that ground may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. * * *

Statement of the Case.

The petitioner, Fred Coduto, and two others, Howard Frye and Coyit Baker, were indicted by the January, 1959, Grand Jury of the Northern District of Illinois, Eastern Division, in a nine count indictment. Counts One and Two concerned a certain purported sale of narcotic drugs, to-wit, heroin, on August 9, 1958. Only Frye and Baker were named as defendants in these two counts. Counts Three and Four concerned a purported sale of heroin on August 15, 1958. Frye and Baker were again the only defendants named in these counts. Counts Five and Six concerned a purported sale of heroin on August 18, 1958. In these counts the petitioner Coduto was named as a defendant as were Frye and Baker. Counts Seven and Eight concerned a purported sale of heroin on August 20, 1958; again Coduto, Frye and Baker were named as defendants. Count Nine charged that from August 8, 1958, to August 20, 1958, Coduto, Frye and Baker conspired to "unlawfully and fraudulently receive, conceal and facilitate the transportation and concealment after unlawful importation into the United States various quantities of heroin hydrochloride, a narcotic drug, knowing the same to have been so unlawfully imported into the United States contrary to law, * * *."

The indictment was tried in the United States District Court for the Northern District of Illinois, Eastern Division, before Hon. Julius H. Miner, District Judge, and a jury. The issues were hotly contested. The chief witness for the government was an informer Neary McNeal, otherwise known as Frank Edwards, otherwise known as "the thin man". (App. 53) McNeal as well as being an informer, was an admitted narcotics peddler, (App. 80), and by his own admission served sentences in Mississippi for burglary and in Illinois for larceny of an automobile, and twice for possession of narcotics. (App. 80-82) McNeal

also served a sentence, apparently at the United States Penal Institution at Milan, Michigan, for possession of narcotics. (App. 82) Counsel for the petitioner requested that he be permitted to examine the grand jury minutes of the testimony of McNeal. This request was refused. (App. 97)

We shall not recount the evidence which was introduced by both sides in the case, inasmuch as it is not in issue insofar as this petition for writ of certiorari is concerned. Needless to say however, the petitioner and the other defendants denied doing any of the acts charged in the indictment. In cross examination, the attorney for the government was permitted to question the petitioner concerning certain financial transactions and his financial affairs pertaining to a time prior to any of the dates charged in the indictment. (App. 306) The prosecutor also was permitted to cross-examine the petitioner concerning a certain financial transaction which occurred after the dates charged in the indictment.

Prior to the hearing of testimony, but after the jury had been selected and sworn to try the issues, there appeared in the daily papers in Chicago, certain newspaper articles which were prejudicial to the petitioner. These articles contained references to petitioner as "Mr. Big" in narcotics traffic in Chicago. A motion for mistrial based on these articles was made and denied summarily. (App. 51-52)

The jury found all the defendants guilty. (App. 356) After hearing the arguments of counsel on the motions for new trial, the District Judge, without giving the defendants an opportunity to say anything in their own behalf, proceeded to read from an opinion which had been prepared prior to the hearing. He sentenced the defendants

Frye and Baker on each count to twenty years in the custody of the Attorney General, all of which were to run concurrently with each other. The petitioner, Fred Coduto, was sentenced to the custody of the Attorney General on each count for a period of twenty years. The sentence as to Count Seven was specified to be consecutive to the sentence on Count Five, thus making the petitioner's actual sentence forty years, even though from the record he was a first offender who bore a good reputation for being a peaceable and law-abiding citizen.

The Court of Appeals for the Seventh Circuit affirmed the judgments as to all of the defendants.

Basis for Federal Jurisdiction.

The case was instituted in the District Court by indictment by the Grand Jury of the Northern District of Illinois, Eastern Division, for violations of 26 U.S.C. Sec. 4075(a), as amended by the Narcotic Control Act of 1956; and 21 U.S.C. Sec. 174, as amended by the Narcotic Control Act of 1956.

Reasons for granting Writ.

1. The first of the questions presented raises a clear conflict between the Court of Appeals for the Seventh Circuit in this case, the Court of Appeals for the Second Circuit in a line of cases the most recent of which is *United States* v. *Hernandez*, 2 Cir., 282 F. 2d 71, the Court of Appeals for the Fifth Circuit in *Parr* v. *United States*, 5 Cir., 265 F. 2d 894, and the Court of Appeals for the Fourth Circuit in *Pittsburgh Plate Glass Company* v. *United States*, 4 Cir., 260 F. 2d 397.

The chief witness for the government was an informer, Neary McNeal, who was an admitted, burglar, thief, narcotics peddler and possessor. At one point during McNeal's testimony on cross examination, the attorney for the

government deemed it necessary to inform the court that McNeal had told an untruth in answer to a question propounded by the attorney for the petitioner. (App. 104) Prior to cross examination, counsel for petitioner requested all statements made by McNeal and also the minutes of the grand jury of his testimony before that body. (App. 97) The trial court refused this request. The Court of Appeals passed upon the question as follows:

> Defendants' contention of error with respect to denial of access to the grand jury's minutes of McNeal's testimony is totally devoid of merit. No attempt was made to show "a particularized need" which would outweigh the policy of secrecy. *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, is dispositive of this issue. The sole reason advanced for such inspection is that informer McNeal was a "disreputable witness". Certainly the character of the witness in and of itself does not demonstrate the particularized need referred to in Pittsburgh. And the record does not show that the request was made for the purpose of impeachment. Nor was a request made that the trial court examine McNeal's grand jury testimony *in camera* as was requested in *United States* v. *Hernandez*, 2 Cir. 282 F. 2d 71.

This language would indicate that the Court of Appeals did not fully comprehend the facts of the case. After McNeal testified on direct examination and had been cross examined by counsel for the other defendants, counsel for the petitioner requested all statements made by the witness and the grand jury minutes of his testimony. The only inference which could be drawn from this is that it was for the purpose of discovering impeaching material. The prosecutor evidently recognized this. In response to the motion he stated:

> "I would not produce, pursuant to Thirty-five Hundred [18 U.S.C., Sec. 3500, the so-called Jencks Act.] I don't think I am required to produce any statement that he made to the Grand Jury. (App. 97)

It is of such common knowledge that it may be judicially recognized that the purpose of requesting statements under 18 U.S.C. 3500 is only to obtain impeaching material. Such was the purpose of the request in the *Jencks* case itself, *Jencks* v. *United States*, 353 U.S. 657, and so it was recognized by this Court, 353 U.S. 657, 667, even though in the report of the case there is no showing that the motion for leave to inspect the reports of the witnesses contained any express language that the purpose of inspection was to discover impeaching material. 353 U.S. 657, 665, 666.

We do not wish to imply that we are seeking the grand jury minutes on the basis of the Jencks Act. We do believe that we were entitled to at least have the trial court inspect them *in camera* for a determination of the question of whether or not they contained any impeaching matter. This contention is based wholly upon Rule 6(e) of the Federal Rules of Criminal Procedure.

The terminology; "disreputable witness", stems from the following colloquy:

> By Mr. Bellows: Your Honor, it is a matter of discretion, there again about an order for the production of testimony before the Grand Jury where it appears that a miscarriage may result.
>
> By The Court: I do not think any such miscarriage can result as yet.
>
> By Mr. Bellows: Well, it could come from a disreputable witness such as this, * * * (App. 97)

The argument of counsel for the petitioner was that the testimony of McNeal was highly suspect because of his disreputable background and, therefore, that it was highly probable that the grand jury minutes might contain matter materially inconsistent with his testimony in court.

The decision of the Court of Appeals in this case is in conflict with that of the Court of Appeals for the Second Circuit in *United States* v. *Hernandez*, 282 F. 2d 71. There

the Court of Appeals reversed a conviction where the defendant had moved for the court to inspect the minutes of the grand jury concerning the testimony of an agent of the Federal Bureau of Narcotics. The Court said: (282 F. 2d 71, 72)

> While several assignments of error are raised, we find it necessary to consider only that relating to the trial court's refusal to inspect the minutes of [Federal Bureau of Narcotics Agent William Newkirk's] grand jury testimony. The Government's case rested largely upon Newkirk's testimony, so that any doubts cast upon his credibility by a variance between such testimony and that given before the grand jury undoubtedly would have influenced the jury's deliberations. It was thus incumbent upon the trial court to inspect the minutes, as requested by the defendant, in order to ascertain whether any material inconsistencies existed. *United States* v. *Zborowski*, 2 Cir., 271 F. 2d 661, 666; *United States* v. *McKeever*, 2 Cir., 271 F. 2d 669, 672; *United States* v. *Spanglet*, 2 Cir., 258 F. 2d 338; and see also *United States* v. *Tomaiolo*, 2 Cir., 280 F. 2d 411. Its failure to do so requires that the conviction be reversed.

Thus under the procedures of the Second Circuit, when a demand is made for the production of the grand jury minutes, it is incumbent upon the trial judge to examine them to determine whether they contain any material inconsistencies. The Court of Appeals for the Seventh Circuit indicated that a request should have been made *by the petitioner* for the trial judge to examine the grand jury minutes *in camera*. Nothing in the Second Circuit cases substantiates this holding. In fact, at least one of the cases which formulated the Second Circuit procedure, *United States* v. *Spanglet*, 2 Cir., 258 F. 2d 338, arose out of a situation in which the defendant had requested the production of the grand jury minutes and the trial judge had, on his own motion apparently, inspected them *in cam-*

era and refused the defendant access to the minutes. Admittedly, the Second Circuit practice now has evolved to the point where the defendant merely requests the trial court to inspect the grand jury minutes but no case requires that this be done and it would seem to be the height of injustice to refuse access to grand jury minutes merely because the motion was for the production of the minutes rather than for the court to inspect the minutes. In the present case there was never any contention of the petitioner that the trial court should not make an *in camera* inspection of the grand jury minutes. The record shows that petitioner addressed his request to the sound discretion of the court. (App. 97) However the trial judge denied the request summarily without inspecting the minutes.

At least two other circuits have made pronouncements on this question. In *Parr* v. *United States*, 5 Cir., 265 F. 2d 894, the Fifth Circuit has seemingly approved the procedure of the Second Circuit saying: (265 F. 2d 894, 902, 903)

> It is thus clear that the trial court has the express power in a proper case to order grand jury proceedings to be disclosed. It is uniformly stated that secrecy is the general rule and variations from it the exception. • • •
>
> All the cases cited here both by appellants and the United States expressly or impliedly accept this thesis. This, then, must mean that an exercise of discretion must determine whether in a particular case such order should issue, traditionally, of course, it is the trial judge whose discretion is involved. We have so held in *United States* v. *Byoir*, 5 Cir., 147 F. 2d 336, 337.
>
> • • •
>
> The Court of Appeals for the Second Circuit has held that the proper procedure when such a request is made for impeachment purposes is for the trial court to read the grand jury record touching the testimony in issue and determine whether there is a conflict, and if there is, to permit the defendant to use it for impeachment purposes. *United States* v. *H.J.K. Theatre Co.*, 2 Cir., 236 F. 2d 502. Even in such a case the

court is permitted, in the exercise of a sound discretion to prevent merely cumulative impeachment, to limit such use, *Id.*, at page 508.

In the case of *Pittsburgh Plate Glass Company* v. *United States*, 4 Cir., 260 F. 2d 397, aff'd. 360 U.S. 395, the Fourth Circuit approved a procedure which differed from those formulated by the Second and Fifth Circuits, and stated: (260 F. 2d 395, 404)

> • • • The Judge should not be compelled to inspect in all cases; neither should he indiscriminately refuse, but he should exercise his judgment according to the circumstances. Certainly we could not approve any rule, such as contended for by the defendants here, requiring the automatic delivery of grand jury transcripts to defendants on demand.

With the decision of the Seventh Circuit in the present case, one may find at least three different procedures prevailing concerning the disclosure of grand jury minutes to the defendant for purposes of impeachment: 1) The procedures of the Second and Fifth Circuits in which the defendant's request for the transcript of the grand jury testimony of the witness makes it mandatory for the court to examine the minutes and if impeaching material is present disclose it to the defendant. 2) The procedure of the Fourth Circuit where upon a request by the defendant for the disclosure of the grand jury testimony the court may exercise its discretion as to whether or not it will examine the grand jury minutes. And 3) The procedure presumably required in the Seventh Circuit where the defendant must not merely make a request for the grand jury testimony addressed to the discretion of the court after the witness has testified, but must also specifically state that the request is for the purposes of impeachment (even though such is the only purpose which could possibly be inferred from the record) and make the further specific request that the court inspect the minutes *in camera*.

Regardless of the statement of the Court of Appeals for the Seventh Circuit in this case that a particularized need was not shown as is required by *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, the record is clear that such need was present and was shown to the trial court. The Second Circuit has in effect held that a showing that the witness has testified before the grand jury and that his testimony is the key to the prosecution is a sufficient showing of a particularized need for the production of the grand jury minutes. The Second Circuit has applied this test in cases where the witness is of otherwise high credibility such as the Federal Narcotics Agent in the *Hernandez* case. If this is the test it should certainly have been applied in this case where the key witness was an informer, had been convicted of infamous crimes and had, by the admission of the government prosecutor, lied while giving testimony. In addition, the trial court was apprised that materially impeaching testimony might be contained in the grand jury minutes when McNeal testified that it was in his testimony before the grand jury that he had first told anyone that the petitioner had been present at the scene of one of the discussions concerning the sale of narcotics. This disclosure was made in an attempt to explain a discrepancy between McNeal's testimony on direct examination and a prior statement. (App. 101-102)

A review of this case by this Court is required in order that the conflict between circuits be resolved in regard to the procedures for the production of grand jury minutes; and a due regard for the proper administration of criminal justice would require that this case be reversed.

2. The second of the questions presented also involves a conflict between circuits. In this point the problem concerns the procedures to be followed upon a motion for mistrial based upon prejudicial articles appearing in the newspapers in the city wherein the case is being tried.

After the jury had been selected but before any testimony was heard there appeared in newspapers of general circulation in Chicago the following articles: (App. 51, 52)

Chicago Tribune, Tuesday, October 20, 1959.

A jury was selected Monday before Judge Julius H. Miner in Federal District Court to try Fred Coduto, 52, of 1823 North Thatcher Avenue, Elmwood Park, described by prosecutors as the key figure in the narcotics traffic and the two co-defendants are charged with possessing and selling narcotics.

The co-defendants, are Howard Frye, 48, of 535 East 86th Place, and Coyit Baker, 46, of 1422 East Marquette Road.

Coduto is under suspension from his job as a truck loader for the City Bureau of Streets and Sanitation. The indictment contains nine counts. The maximum penalty on each count upon a conviction could be from five to twenty years in prison.

Chicago American, Tuesday, October 20, 1959.

Million Dollar Dope Trade
Coduto to Trial

A Federal jury today begins hearing testimony in the narcotics conspiracy trial of Fred Coduto, reputed top man in Chicago narcotics traffic. The indictment against Coduto contains nine charges of possession and selling narcotics. He faces a maximum sentence of 180 years.

Coduto, 42, of 1823 Thatcher Avenue, Elmwood Park, was named in the indictment with co-defendants, Howard Frye, 48, of 535 East 86th Place, and Coyit Baker, 46, of 1422 East Marquette Road.

Paul Newy, Chief Investigator for the State's Attorney, said Coduto was "Mr. Big in local narcotics," and called his dope trade a million dollar a year business.

Coduto is under suspension from his job as a truck-loader for the City Bureau of Streets and Sanitation.

The record also indicates that reference was made to the trial on a news broadcast on Radio Station WMAQ, of Chicago. Counsel for petitioner moved for a mistrial

because of these articles and news broadcasts. (App. 52, 53) The trial court summarily overruled the motion without making any determination as to whether or not the petitioner had been prejudiced by them.

The Court of Appeals decided the issues as follows:

> If the impropriety of such publication, whether factual or not, in advance of the trial be conceded, nevertheless, the record does not disclose that any of the jurors had read or heard of the articles in question. Under the circumstances here shown we can not say that the trial court's denial of the mistrial motion was error requiring reversal for a new trial. *Paschen* v. *United States*, 7 Cir., 70 F. 2d 491. In *Marshall* v. *United States*, 360 U. S. 310, cited by defendants the record disclosed that the articles were read by some of the jurors. They contained recitals of specific factual material, inadmissible in evidence, consisting of reference to two previous felony convictions of the defendant and his prescribing drugs although not a physician. Here, in addition to there being no showing that any juror read or was acquainted with the articles their content was a general characterization of the reputed activities of one of the defendants. We do not make this distinction as justifying such publications and we are mindful of the observance made in *Paschen* over a quarter of a century ago as to the seeming futility of the repeated admonition of the courts against pretrial publication which can result in prejudice. But able counsel here, although requesting a mistrial on the basis of the publication alone, made no claim that any of the jurors read or knew of the articles, nor did he ask for their interrogation on the subject. We are of the opinion from our examination of the record that the guilt of the defendants is well established and under the particular facts and circumstances here involved, including the contents of the articles described, and the instruction given by the court directing the jurors "wholly to disregard" anything which contrary to the court's admonitions they may have read, seen or heard concerning the case, we are not disposed to say that there was error requiring reversal for a new trial.

This ruling is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Marson* v. *United States*, 6 Cir., 203 F. 2d 904; and *Briggs* v. *United States*, 6 Cir., 221 F. 2d 636. In *Marson*, the court held: (203 F. 2d 904, 911)

> • • • In [*King* v. *United States*, 6 Cir., 25 F. 2d 242] it is implicit that in circumstances such as appear in the case before us, the trial court, upon its attention being called to the publication of a prejudicial newspaper article during the course of the trial, should make inquiry of the jury as to whether they had read the article, and clearly and emphatically caution it against allowing it to influence their verdict; and the case of *Stuntz* v. *United States*, [8 Cir., 27 F. 2d 575], is authority for the rule that the publication of a newspaper article may be so prejudicial that, in spite of the caution of the trial court, a fair trial would be thereby rendered impossible, and a motion for a mistrial must be granted.
>
> Under the showing of appellant's counsel, it was the duty of the court to interrogate the members of the jury to ascertain whether they had seen the newspaper article and, if so, whether it had created any prejudice in their minds. • • •

In the *Briggs* case the Court of Appeals for the Sixth Circuit went so far as to hold that even though the defendant not only did not request that the jury be interrogated but refused to agree to such a procedure, it was nevertheless incumbent upon the trial judge to take "such steps as were considered necessary by him to rebut [the presumption that the rights of the defendant had been prejudiced by the publication of prejudicial newspaper articles], and if not convinced that the presumption had been rebutted, to have declared a mistrial." 221 F. 2d 636, 639.

The presumption of prejudice arises from the nature of the newspaper articles themselves. There can be little doubt that a newspaper article which contains information which is either not admissible in evidence or not admitted in

evidence and which is of the purport that the petitioner was a wholesale trafficker in narcotics is presumptively prejudicial. *Marshall* v. *United States*, 360 U.S. 310.

Therefore, under the procedures of the Sixth Circuit, the trial court should have conducted an inquiry as to whether or not the presumption of prejudice to the petitioner had been rebutted. This he failed to do. We request the Court to review this case in order that the conflict between circuits in this regard be resolved. We further submit that the proper procedures are those adopted by the Sixth Circuit and that this case should be reversed for the failure of the trial judge to comply with them.

3. The third point raised in this petition is whether a combination of errors deprived the defendant of a fair trial, and whether this Court in the exercise of its supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts ought to reverse the conviction of the petitioner. *Marshall* v. *United States*, 360 U.S. 310; *Bruno* v. *United States*, 308 U.S. 287; *McNabb* v. *United States*, 318 U.S. 332.

These errors are the following: a) Whether the trial court erred in permitting counsel for the government to cross examine the petitioner concerning his financial affairs, and to present evidence in rebuttal concerning his financial affairs. b) Whether the prejudicial conduct of the trial court deprived the petitioner of a fair and impartial trial. c) Whether the trial court erred in refusing to give certain instructions tendered by the petitioner concerning his explanation of alleged flight. d) Whether the trial court erred in refusing to give an instruction on the law of the defense of alibi, where there was evidence in the record which if believed by the jury would tend to prove the defense of alibi. And e) Whether the trial court erred in failing to give an instruction tendered by the

defendant concerning the credibility of the testimony of an informer witness.

3a. The United States Attorney, over repeated objection, questioned the petitioner regarding his salary for the job at which he was employed preceding his arrest, his other sources of income, the cost of his home, how he purchased and financed it, his bank deposits and other financial transactions at his bank prior to the dates in the indictment. (App. 306-311)

All pretext as to why the United States Attorney, repeatedly questioned the petitioner as to these matters was abandoned early in the cross examination when the petitioner was asked if he had any other job during the period from the summer of 1955 to August of 1958. Upon his giving a negative answer he was immediately asked:

> "Q. You didn't sell any narcotics during that period, did you?" (App. 307)

It is clear from the foregoing question that the sole purpose of the United States Attorney in following this line of questioning was to implant in the jury's mind the suggestion that the petitioner was a wealthy man, and that inasmuch as he had a job as an ordinary day laborer he must have obtained his wealth from other illicit sales of drugs.

We do not suggest to this Court that evidence of suddenly acquired wealth is inadmissible where a defendant is on trial for a crime in which pecuniary gain is a motive. What is suggested is that evidence of wealth existing prior to the date of the alleged offense coupled with the not-so-subtle intimation that the defendant has acquired such wealth by other offenses, not charged in the indictment nor in any way related to the indictment offenses, is prejudicial to such defendant and inadmissible.

In *Williams* v. *United States*, 168 U. S. 382, this Court considered a problem so similar to that involved herein that the opinion must be considered as controlling authority in the present case. In that case the defendant had been accused in two indictments, (which were consolidated in one trial), with extorting a total of $185.00 from immigrants in order to approve their applications for admission into this country. As part of its case the Government proved that the defendant had deposited $4700.00 in various banks after the alleged offense had taken place. This Court reversed and remanded the case, holding that the evidence had been improperly admitted:

> "The manifest object and necessary effect of this evidence was merely to give color to the present charges, and to cause the jury to believe that the accused had in his possession more money than a man in his condition could have obtained by honest methods, and, therefore, he must be guilty of extorting the two sums in question." 168 U.S. 382, at 396; see also *Neal* v. *United States*, 8 Cir., 102 F. 2d 643, 649.

One incident of the petitioner's financial affairs, about which he was examined, arose subsequent to the time of the alleged offenses. On cross examination he was asked if he had, on September 5, 1958, gone to the Central National Bank and changed Seven Thousand Dollars in five, ten and twenty dollar bills for seventy one hundred dollar bills. In rebuttal the government was allowed, over objection, to introduce the evidence of Marion Guiffre that Coduto had been in the bank on the 5th of September and that he, or the man he was with, changed Seven Thousand Dollars in small bills for seventy one hundred dollar bills. (App. 320, 324) The action of the trial court in allowing the cross examination of the defendant concerning this incident and in permitting the evidence in rebuttal was, in the light of the evidence in the case, indefensible.

The sum of money allegedly changed by Coduto and the sum expended by the State's Attorney's Office were not even remotely connected. The former sum was considerably larger than the latter. As a result the jury could have only received the impression that Coduto was guilty of other unnamed or charged narcotics offenses.

3b. Throughout the conduct of the trial the trial court exhibited an attitude towards the petitioner which can only be characterized as one of antagonism. There can be no doubt that this attitude prejudiced the petitioner in the eyes of the jury and deprived him of his right to a fair and impartial trial. We ask the Court's indulgence in setting out those portions of the record which we feel demonstrate the partiality exhibited by the trial court.

During the cross examination of the informant Neary McNeal, the following occurred:

"By the Court: Haven't we gone over all this before?

"By Mr. Bellows: I have not touched it at all.

"By the Court: You have not, but he has, every detail." (App. 111)

This characterization of the witness' testimony by the trial court was unusually prejudicial. Counsel attempted to show that he had omitted many important details because his relation of that particular incident was a fabrication. By telling the jury that the witness had gone into the matter in great detail the trial court obliterated the defendant's right to cross examination. It is not within his province as a trial judge to deprecate and limit the right of cross examination. See *Malvezzi* v. *United States,* 6 Cir., 2 F. 2d 954; *Billeci* v. *United States,* D.C. Cir., 184 F. 2d 394, 402, 403.

In relating the occurrence of August 8th on direct examination, State Narcotics Agent Turnbou testified as follows:

"Q. Did you see the driver of this 1957 Ford automobile?

"A. Yes, I did.

"Q. Were you able to identify him at that time?

"A. No, I could not." (App. 119, 120)

Later when he testified concerning the identity of the person who parked a 1955 blue and white Oldsmobile on the north side of Lake Street just east of Damen, he identified Coduto as the driver and as the same person whom he had seen on August 8th. (App. 133). Counsel for petitioner objected to this conclusion because the witness had previously stated that he could not identify the driver of the Ford on August 8th. The statements made by the court are so prejudicial that we again take the liberty of setting them out.

> By Mr. Bellows: Your Honor, may I interpose an objection? If I am not mistaken, this witness testified that on the 8th he couldn't identify the person who was in that car.
>
> By The Court: Yes, he could, but he did not know until later. He knew who it was.
>
> By Mr. Bellows: No, he said he could not identify him.
>
> By The Court: He saw him but he could not identify him until later. (App. 133)

* * * *

The validity of counsel's objection was subsequently further substantiated by disclosure on cross examination of a statement made by the witness on August 8th that he could not give any description of the driver of the 1957 Ford. (App. 143)

We submit that the court improperly commented on the evidence. The court told the jury contrary to the evidence that Turnbou could identify Coduto on August 8th, but that he did not know who he was.

During the direct examination of the petitioner the following objection and argument occurred out of the presence of the jury:

> "By Mr. Bellows: Your Honor, I don't want to be disrespectful, but throughout the testimony of this witness your Honor has been reading, I don't know what, and that has occurred not only—I say it with respect, your Honor, and I say it with feeling because, as I say, I am cognizant of what these things mean to a jury.
>
> "Many a time when our case was on your Honor did the same thing. Now all through this man's testimony you have paid no attention to it. The jury are taking note of it.
>
> "Now perhaps you have heard everything—
>
> "By the Court: Every word that's said.
>
> "By Mr. Bellows: I am sure you must, but the point is, your Honor—
>
> "By the Court: So far you haven't touched a single thing about the material things. (App. 298-299)

At the conclusion of the direct examination the trial court explained to the jury that he had been reading the jury instructions in order to expedite matters. (App. 305) When the incident was recalled to the trial court's attention during the argument on the motion for a new trial the court said that he had only glanced at some other matters. He denied that he had said that what the defendant was saying wasn't important. (App. 357)

It is well known that the actions of the trial court, before a jury, can easily influence the decision of the jury. The Supreme Court of Illinois has said:

> "Jurors are ever watchful of the attitude of the judge, and any disclosure of a hostile attitude on his part toward the accused person is very apt to influence them in arriving at their verdict." *People* v. *Filipak*, 322 Ill. 546, 153 N.E. 673, 676, (1926); see also *People* v. *Berardi*, 321 Ill. 47, 151 N.E. 555, 560 (1926).

This Court, in a slightly different context, has recognized the great influence which the trial judge exerts on the jury's determination of the issues in a case, thusly:

> "The influence of a trial judge on the jury 'is necessarily and proper of great weight' and 'his lightest word or intimation is received with deference and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided.'" *Quercia* v. *United States*, 289 U.S. 466, 470.

The attitudes and preconceived notions of the trial court concerning the defendant's guilt was finally exhibited on the hearing on the motion for a new trial. Prior to hearing the arguments of counsel on the motion for a new trial, the trial court had already prepared an opinion and judgment order. (App. 358) When counsel for the defendant argued to the effect that the court had made up his mind prior to hearing the motion for a new trial, as evidenced by his having had prepared a written opinion, the court replied:

> "By The Court: • • •
> I was prepared to do one of two things when you got through with your arguments, either to set the verdict aside or sustain it. I didn't want any more continuances. I have spent a lot of time on it.
>
> • • •
>
> "By Mr. Bellows: Your Honor had a prepared statement.
> "By The Court: I had two statements prepared, one to set the verdict aside, which didn't justify itself, and the other one." (App. 359)

We submit that this last statement by the court needs no further comment.

3c. The petitioner Coduto submitted to the court the following instruction:

> The Court instructs the jury that in determining whether the defendant fled from the vicinity where he lived because of consciousness of guilt, the jurors must consider the explanation given by the defendant that he ran away from said location because he was afraid that he might be killed by persons who were accosting him and not because he was attempting to escape apprehension. (App. 333)

This instruction was marked "refused" and was not given.

The court, thereafter, instructed the jury as follows:

> The court instructs the jury that if the jury believe from the evidence, beyond all reasonable doubt, that a crime was committed, and if you also believe, beyond all reasonable doubt, that the defendant, after the commission of the crime with which he stands charged, fled and remained away until he surrendered to the authorities, such flight and such voluntary surrender are proper circumstances to be considered in determining the guilt or innocence of that defendant. (App. 353-354)

It is the contention of the petitioner that the failure of the trial court to give the requested instruction, in view of the nature of the instruction that was given, withdrew a material portion of the defendant's testimony from the consideration of the jury and thereby deceived the jury as to the pertinency of that aspect of the defendant's defense. It is not questioned that the instruction given by the court was proper under the circumstances, See *Allen* v. *United States,* 164 U.S. 492 (1896). But the court, in giving that instruction, should have considered that the defendant is also entitled to any explanation of flight consistent with his innocence. See *People* v. *Bundy,* 295 Ill. 322, 129 N.E. 189 (1920). There having been evidence submitted to the jury that the defendant Coduto fled from his home because he was afraid that the men attacking him were robbers

(App. 301), and that the car driven by the defendant was filled with bullet holes (App. 301, 211), it was error for the trial court to have withdrawn that portion of the defendant's theory of the case from the jury. See *Smith* v. *United States*, 6 Cir., 230 F. 2d 935; and *Tatum* v. *United States*, D.C. Cir., 190 F. 2d 612, 617, where the Court said the following:

> We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary, for "in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own." • • • As we said in *Williams* v. *United States*, 1942, 76 U.S. App. D.C. 299, 301, 131 F. 2d 21, 23, trial by a jury of peers "is supposed to safeguard our institution of fair trial by insuring impartiality. But of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment?"

3d. There can be no doubt that the testimony, given by the petitioner on direct examination, concerning his activities on August 18, 19 and 20, 1958, covered the whole of the times concerned in the four counts of the indictment charging the substantive offenses. (App. 300) These are Counts Five, Six, Seven and Eight. This testimony also covers the times of certain of the overt acts charged in the conspiracy count, Count Nine. If believed by the jury it would have been its duty to find the defendant Fred Coduto not guilty of at least the four substantive counts, under the defense of alibi. Nevertheless, the trial court refused to give the following requested instructions:

> The Court instructs the jury that the defendant, Fred Coduto, has interposed the defense of an alibi as to certain alleged acts between the Government's

witness, Frank Edwards, and the defendant, Fred Coduto, alleged to have occurred on August 18, 19 and 20, 1958. If after considering the testimony in this case, you are unable to say that such acts occurred at such time and place, then you are to find the defendant, Fred Coduto, not guilty.

The Court instructs the jury that the defense of an alibi is a good and legal defense and is not to be disregarded by you from mere whim but should be carefully considered by you.

Evidence concerning an alibi may justify an acquittal if the evidence raises a reasonable doubt of the presence of the accused at the time and place alleged in the indictment. The introduction of testimony by the accused to prove an alibi does not shift the burden of proof from the prosecution to the accused, but the prosecution is required to prove the presence of the accused beyond a reasonable doubt. If the evidence concerning an alibi when considered with all the other evidence raises a reasonable doubt as to the guilt of the accused, you are required to find the accused not guilty.

In *United States* v. *Marcus*, 3 Cir., 1948, 166 F. 2d 497, 503, 504, the following language is found in the holding of the Court:

By the weight of authority it is held that the instructions on the presumption of innocence of the accused, and of the necessity of fastening every necessary element of the crime charged upon the accused beyond a reasonable doubt, are not enough in cases involving the necessary presence of the accused at a particular time and place, when the accused produces testimony that he was elsewhere at the time. If the accused requests an instruction as to the burden of proof on his alibi, an instruction on the subject must be given so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi, as well as all other phases of the case. Proof beyond a reasonable doubt as to the alibi never shifts to the accused who offers it, and if the jury's consid-

> eration of the alibi testimony leaves in the jury's mind a reasonable doubt as to the presence of the accused, then the government has not proved the guilt of the accused beyond a reasonable doubt. • • •
>
> The appellee claims otherwise, but cites no authorities. He claims, however, that the proffered instruction unduly states details of the case, and for that reason the court was right in refusing to give it. We think it clearly states the situation, but even if it did not, since an instruction on the issue was requested, it was the court's duty to itself compose and give a proper instruction on the subject. *Falgout* v. *United States*, 5 Cir., 279 F. 513; *Goldsby* v. *United States*, 160 U.S. 70, 16 S.Ct. 216, 40 L.Ed. 343.

Furthermore, the case of *Fay* v. *United States*, 9 Cir., 1927, 22 F. 2d 740, 742, sets to rest any question as to the amount of evidence needed to permit the jury to consider the defense of an alibi.

> We are unable to perceive the pertinency of defendant's extended argument to the effect that, to constitute an alibi in law, the defendant must have been so far from the scene of the crime at the time of its commission that he could not have committed it. That undoubtedly is true. *But it does not follow that such an attempted defense may by the court be withdrawn from the jury, or that the court may properly decline to instruct upon it, merely because the evidence in support of it may be thought to be inconclusive or even feeble. If supported by any evidence at all, defendant was entitled to have the defense go to the jury,* and it is not important whether he was miles away, or only a few yards away, from the junk house, if he was not in it at the time the government contends the offenses were committed therein (Emphasis added.)

See *Tatum* v. *United States*, D.C. Cir., 1951; 190 F. 2d 612, 617, quoted on page 24, *supra*.

In light of the above cases it was highly erroneous for the trial court to refuse to give an instruction on the defense of an alibi.

3e. The only evidence directly connecting the petitioner with the alleged offenses came from Neary McNeal, alias Frank Edward, Alias The Thin Man, an admitted narcotics peddler who by his own testimony had been in the Mississippi State Prison for burglary, the Cook County Jail for automobile larceny, the Chicago House of Correction in 1951 for possession of narcotics, the Federal penal institution at Milan, Michigan for possession of narcotics, and the Illinois State Penitentiary for possession of narcotics. The role of McNeal in this case is that of an informer, and it cannot be characterized as anything else. Nevertheless, the trial court refused to instruct the jury as requested by the defendant that the testimony of an informer is to be viewed with caution (App. 328, 329, 331). That this refusal is error cannot be denied in the light of the cases on the subject. In *Fletcher* v. *United States,* D.C. Cir., 1946, 158 F. 2d 321, 322, the Court said:

> Granting that the credibility of the testimony of a paid informer is for the jury to decide, it nevertheless follows that where the entire case depends upon his testimony, the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness's own interest.

In a similar vein is *Cratty* v. *United States,* D.C. Cir., 1947, 163 F. 2d 844. In that case the Court held that it could not reverse the case because the jury had not been instructed as to the credibility of the testimony of an informer. It could not reverse, the Court said, in the absence of a specific request for such an instruction. The Court of Appeals went on to say that the trial court should have given such an instruction of its own motion, although the failure to do so could not be assigned as error.

From these cases there is no doubt that when the defendant requests that an instruction be given concerning the credibility of informer witnesses, it should be given.

4. The last point which we raise in this petition concerns the excessiveness of the sentence of the petitioner. The record shows and it was undisputed that the petitioner was a man of prior good reputation in the community wherein he lived and worked for being a peaceable and law abiding citizen. (App. 291-293)

The Court of Appeals ignored the petitioner's contention that his sentence was excessive and affirmed it as not being cruel and unusual, citing *Smith* v. *United States*, 10 Cir., 273 F. 2d 462. In so doing, the Court of Appeals not only ignored its own precedent established in *United States* v. *Wiley*, 7 Cir., 278 F. 2d 500, but further ignored the precedent established by this court in *Yates* v. *United States*, 356 U.S. 363, and upon which the Court of Appeals based its decision in the *Wiley* case.

In the present case the defendant was a man of prior good reputation (App. 291-293). Further the record is devoid of any showing that he had ever participated in any other illegal narcotics traffic, or any other criminal activity. At most the petitioner was convicted of two sales of heroin, and a conspiracy to make two other sales of heroin. The trial judge, evidently having read the newspaper publicity about the case, see point 2 *supra*, but with no competent evidence before him called the petitioner a "wholesale supplier of this deathly drug." (App. 22) and sentenced him to a term of forty years in the custody of the Attorney General.

We call the Court's attention to the opinion of the court in *Smith* v. *United States*, 10 Cir., 273 F. 2d 462, 467:

> • • • The 14 consecutive sentences in this case were imposed for 12 crimes resulting from three narcotics sales and 2 crimes resulting from the possession of marihuana and heroin. The defendant was a first offender, and the record does not indicate that the

> case was an aggravated one. Although this court sitting *en banc*, is not of the view that the punishment is cruel and unusual, it is of the opinion that the 52 year sentence is greater than should have been imposed. However, the majority believes that under the federal practice, appellate courts are without power to control or modify a sentence which is within the limits fixed by a valid statute.

Although it was decided over one year prior to the decision in the *Smith* case, the opinion of this Court in *Yates* v. *United States*, 356 U.S. 363, was not mentioned in the opinion in the *Smith* case. In *Yates*, this Court held: (356 U.S. 363, 366, 367)

> Reversing a judgment for contempt because of errors of substantive law may naturally call for a reduction of the sentence based on an extent of the wrongdoing found unsustainable in law. Such reduction of the sentence, however, normally ought not be made by this Court. It should be left, on remand, to the sentencing court. * * * However, when in a situation like this the District Court appears not to have exercised its discretion in the light of the reversal of the judgment but, in effect, to have sought merely to justify the original sentence, this Court has no alternative except to exercise its supervisory power over the administration of justice in lower federal courts by setting aside the sentence of the District Court.

This doctrine was accepted by the Court of Appeals of the Seventh Circuit in the *Wiley* case. The *Wiley* case was not a contempt action, but was a criminal indictment for violation of the laws forbidding possession of goods stolen from an interstate shipment. 18 U.S.C. §659. There can be no doubt therefore that if the *Yates* case is applicable to criminal cases other than contempts, the Court of Appeals should have considered the petitioner's contention that his sentence was excessive. We urge the Court to consider this case in order that this question, which is of import-

ance to every criminal case appealed to a Court of Appeals, may be resolved. We further submit that the sentence imposed upon the petitioner is excessive and requires reduction.

CONCLUSION.

For the above and foregoing reasons, a writ of certiorari ought to issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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On the Brief

APPENDIX I.

OPINION RENDERED BY MINER, DISTRICT JUDGE

By the successful prosecution of Fred Coduto, Howard Frye and Coyit Baker, the United States Government has plugged the flow of narcotics at one of its main sources.

The defendant, Fred Coduto, was a wholesale supplier of this deathly drug to lesser traffickers who plied the nefarious trade among unsophisticated weaklings whose craving increases with each dose until they become full time slaves to the destructive habit.

The sale of heroin is the most hideous and diabolical crime against mankind. At times it is more treacherous than murder. It inflicts living deaths upon its victims by resulting in serious physical and mental disorders. It strews human wreckage in its path.

The prohibitive cost of procurement of narcotics, together with the incapacitation of the addicts to procure and maintain steady employment, are too frequently the causes of juvenile delinquency and every conceivable crime, including robberies and murders, to satiate the craving.

To check the illicit source of this paralyzing drug, there is a determined tendency in Congress to enact more strenuous laws and to provide more severe penalties for Federal violators. Such efforts would be futile unless the courts assume a corresponding responsibility in making administration of these laws efficacious by imposing appropriate penalties commensurate with the crime.

Accordingly, I sentence Fred Coduto to twenty years in the Federal Penitentiary on counts five and seven of the indictment, to run consecutively, or a total of forty years. I further sentence him to twenty years on each of the remaining counts six, eight and nine of the indictment, to

run concurrently with each other and counts five and seven aforesaid. I also fine him $20,000.00.

I hereby sentence Howard Frye and Coyit Baker to twenty years on each of the nine counts of the indictment, to run concurrently. I fine each of them $10,000.00.

To halt their trafficking in heroin during the pendency of any appeal they may prosecute, to insure their presence in court, and to prevent their flight to escape the consequences of their criminal acts, I now commit all three of them to the custody of the Attorney General or his authorized representatives for imprisonment as aforesaid without bail.[1]

/s/ J. H. Miner
United States District Judge

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[1] In discussing Rule 46 pertaining to bail, in the case of *Ward* v. *United States*, 76 S. Ct. 1063, 1 L. Ed. 2d 25 (1956), Mr. Justice Frankfurter, acting in his capacity as Circuit Justice, noted that before bail may be allowed pending an appeal, the trial judge ought to be persuaded that "the minimum standings for allowing bail" are met, and that

> "Granting of bail presupposes confidence that a defendant will respond to demands of justice. In fixing the amount of bail, Rule 46(c) explicitly adverts to the trustworthiness of a defendant. The bail must be of an amount to 'insure the presence of the defendant.' Impliedly, the likelihood that bail within tolerable limits will not insure this justifies denial of bail."

The Court of Appeals for the Seventh Circuit in *U.S.* v. *Iacullo*, 225 F. 2d 458, had before it in 1955 the predecessor of the 1956 rule provision and quoted from the 1950 decision by Mr. Justice Jackson, as Circuit Justice, in *Williamson* v. *United States*, 184 F. 2d 280, at 281 (C.A. 2):

> "To remain at large, under bond, after conviction and until the courts complete the process of settling

(Footnote 1 continued)

substantial questions which underlie the determination of guilt cannot be demanded as a matter of right. It rests in sound judicial discretion."

In a marginal note in that same decision, Mr. Justice Jackson described the history of the rule and explained its true meaning:

"The unpublished history of the rule in the files of this Court shows that the Advisory Committee submitted it to this Court with this language in the first line, 'Bail *shall* be allowed * * *.' By letter of December 21, 1944, Chief Justice Stone returned the proposed rules, stating that the word 'shall' should be changed to 'may.' It is apparent that the language of the rule was not casual or loose and that the basis for claiming a bail as a matter of right was deliberately eliminated. Although Rule 46 was a restatement of the existing law, the third sentence is new. In a note attached to an early draft, the following comment was made: 'The discretionary power to admit to bail pending appeal is made explicit in the new closing sentence,' citing *Rossi* v. *United States*, 8 Cir., 1926, 11 F. 2d 264.

"Further, it is to be noted that 'may' is used three times in the rule, once in each of the three sentences. I should hardly suspect that this Court used the word with inconsistent meanings—twice to mean 'must' an (*sic*) once to mean 'may.' The only consistent meaning is that 'may' means just that; the judge is empowered to use his own best judgment as to whether a defendant should be free on bail." (Italics by Mr. Justice Jackson.)

This our Seventh Circuit of Appeals has called the "guiding interpretation of Rule 46(a)(2)," and, subject to the 1956 change in language and meaning, it remains today the guiding interpretation of the rule.

APPENDIX II.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1960—SEPTEMBER SESSION, 1960

No. 12847

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
FRED CODUTO, HOWARD FRYE and COYIT BAKER,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 17, 1960

Before HASTINGS, *Chief Judge*, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* The defendants Fred Coduto, Howard Frye and Coyit Baker were indicted in a nine count indictment. The indictment charged violations of Section 4705(a), Title 26 and Section 174, Title 21, U.S.C. Five of the counts were applicable to Coduto and charged him with unlawful sale of narcotic drugs, unlawful receipt, concealment, and facilitation of the transportation and concealment of narcotic drugs, and with conspiracy to violate the narcotic drug laws. The indictment embraced four alleged sales of heroin. Coduto was charged with two of the sales. Frye and Baker were charged with all four sales and named in all nine counts. Each of the de-

fendants was found guilty by a jury of all counts applicable to him. Coduto was sentenced to a period of twenty years on each count; the sentence on count 7 to be consecutive to that on count 5. Frye and Baker were sentenced for a period of twenty years on each count, to run concurrently. All defendants appealed.

Coduto contends that the District Court erred in denying his motions for judgment of acquittal because of insufficiency of identification, in overruling objections to cross-examination of defendant concerning his financial affairs, in demonstrating antagonism toward defendant which prejudiced him with the jury, in failing to conduct a hearing to determine whether certain newspaper items had prejudiced jurors, in failing to give requested instructions, in denying a motion for inspection of grand jury minutes of an informer's testimony, and that the sentence imposed is cruel, unusual, harsh and excessive. Frye and Baker contend that the District Court erred in denying their motion for acquittal because of the unreliability of the informer's testimony, in refusing to give a requested instruction on informer's testimony, overruling objections to the cross-examination of Baker as to the drug addiction and prison record of an acquaintance, in failing to conduct an examination into the question of juror prejudice resulting from certain newspaper articles, and in denying inspection of the grand jury minutes of the informer's testimony. Baker contends, in addition, that the court erred in denying his motion to suppress evidence taken from him.

The main contested issues are:

1. Does the evidence viewed in a light most favorable to the Government support the verdict below?
2. Was the cross-examination of the defendants Coduto and Baker proper and not prejudicial?

3. Did the newspaper articles complained of require allowance of the motion for mistrial?

4. Can allegedly prejudicial newspaper accounts not theretofore called to the attention of the court be raised for the first time by motion for a new trial?

5. Did the court properly deny the application for inspection of the grand jury minutes?

6. Were the statements and conduct of the court below prejudicial?

7. Was the sentence imposed upon defendant Coduto cruel and unusual?

8. Did probable cause and reasonable ground exist under the Fourth Amendment and under 26 U.S.C. 7607 for the arrest and incidental search of the defendant Baker?

Frye and Baker attack the sufficiency of the evidence to sustain their convictions on the ground of lack of credibility of the informer witness, an exconvict and admitted seller of narcotics over a fifteen year period, who, at the time of the events he testified to, was charged with the violation of State narcotic laws. Coduto, in addition, attacks the sufficiency of the informer's testimony identifying him as the person who delivered a package, later ascertained to contain heroin, to the informer on the night of August 18, 1958 while seated in a parked car and to whom the informer, McNeal, handed the money in payment; and who, McNeal testified, on the following night picked up Frye in a car which stopped at a street intersection within the view of McNeal who was seated three or four feet from the window of a bar located on the corner. McNeal also testified that Coduto was the person who, about 12:30 A.M. on August 20, 1958, delivered nar-

cotics to Baker from a parked car about thirty yards from where McNeal was seated in a car in which Baker had driven him to the location.

In our review of defendants' convictions we must view the evidence in a light most favorable to the government on the issue as to whether the case was properly submitted to the jury. *United States* v. *Pinna*, 7 Cir., 229 F. 2d 216. This is not a case where the informer's testimony is without corroboration. The situation here is unlike that in *Panci* v. *United States*, 5 Cir., 256 F. 2d 308, relied upon by defendants, and the credibility of the informer witness was a matter for the jury and is not here open for our consideration. *United States* v. *Taylor*, 7 Cir., 266 F. 2d 310. In *United States* v. *Anderson*, 7 Cir., 101 F. 2d 325, 331 we said:

> "• • • Much is said by appellants about incredible witnesses and untrustworthy evidence, but counsel must know that with these questions we are not permitted to concern ourselves."

The identification of Coduto was corroborated by the testimony of investigator, Turnbou, who identified Coduto as the person who picked up Frye on the night of August 19th at the intersection. The record further discloses that the money furnished the informer to pay for the narcotics purchased was dusted with a fluorescent powder and the serial numbers of the bills recorded. Other witnesses who examined each of the defendants after their arrest under ultra-violet light testified to the presence of luminescence from fluorescent material on the fingers and knuckles and over the front of Frye's shirt and on the cuticles of the fingers and on the outer right palm of Baker's hand and that fluorescent material was present in Coduto's ears, on his legs and underclothing, and in his wallet. Two fifty-dollar bills found in Baker's wallet matched the serial numbers of the money given to McNeal.

We believe it would serve no useful purpose to attempt to set forth or summarize the testimony of the various witnesses concerning the meetings between McNeal and Frye and Baker, the contacts with Coduto, the transaction of each of the four sales alleged and the surveillance of the informer and his movements by the investigators. We have carefully reviewed the record and find that there was more than ample evidence to substantiate the verdict of the jury. No question exists as to the identification of Frye and Baker and what we have said above adequately disposes of the issue of credibility and of the issue of identification as to Coduto.

The record establishes that Coduto was the head man of the operation and that in the short period involved August 9 to 19, 1958, the volume of trafficking in narcotics with one customer, McNeal, involved the sum of $4700.00. Coduto testified that he was a loader on a city garbage truck. In our opinion a foundation existed for examination as to the financial affairs of Coduto and that the District Court properly exercised its discretion in affording wide latitude in cross-examination on the subject to probe the credibility of the witness. *United States* v. *Lawinski*, 7 Cir., 195 F. 2d 1, 7. Defendant's reliance on *Williams* v. *United States*, 168 U. S. 382, is misplaced. *United States* v. *Jackskion*, 2 Cir., 102 F. 2d 683, 684, cert. den. 307 U. S. 635, effectively distinguished and pointed out the limitations of the *Williams* case. There was no error in permitting the inquiry into Coduto's financial affairs on cross-examination.

The contention of error as to the cross-examination of Baker relates to questions asked him concerning his relationship with a Miss Wright, her character and her background. McNeal testified that Miss Wright delivered one of the packages of narcotics to him while the two were

seated in a Packard automobile in a parking lot across from the Barbecue operated by Frye and Baker. Baker on direct examination testified that on August 18, 1958 he got into a Packard automobile with McNeal, that the car was owned by Miss Wright whom he had known for five or six years. In this setting the jury was entitled to know the relationship, if any, between Miss Wright and Baker and her background, if for no other purpose than to test Baker's denial of participation in the sales and possession of the narcotics involved. *United States* v. *Lowe,* 3 Cir., 234 F. 2d 919, 922.

Error is alleged because of denial of a motion for mistrial predicated upon certain newspaper accounts. The motion was made after the jury was selected and sworn but before the introduction of evidence commenced. In a colloquy, out of the presence of the jury, defense counsel stated that two newspapers of that day had carried articles, from which he read, referring to the trial of the defendants, naming them, and in one of which Coduto was referred to as having been described by prosecutors as "the key figure in the narcotics traffic" and in the other in which Coduto, in conjuction with a caption "Million Dollar Dope Trade" was described as having been referred to by the chief investigator for the State's Attorney as "Mr. Big in local narcotics" and "his dope trade a million dollar a year business".

If the impropriety of such publication, whether factual or not, in advance of the trial be conceded, nevertheless, the record does not disclose that any of the jurors had read or heard of the articles in question. Under the circumstances here shown we can not say that the trial court's denial of the mistrial motion was error requiring reversal for a new trial. *Paschen* v. *United States,* 7 Cir., 70 F. 2d 491. In *Marshall* v. *United States,* 360 U. S. 310,

cited by defendants the record disclosed that the articles were read by some of the jurors. They contained recitals of specific factual material, inadmissible in evidence, consisting of references to two previous felony convictions of the defendant and his prescribing drugs although not a physician. Here, in addition to there being no showing that any juror read or was acquainted with the articles their content was a general characterization of the reputed activities of one of the defendants. We do not make this distinction as justifying such publications and we are mindful of the observance made in *Paschen* over a quarter of a century ago as to the seeming futility of the repeated admonition of the courts against pretrial publication which can result in prejudice. But able counsel here, although requesting a mistrial on the basis of the publication alone, made no claim that any of the jurors read or knew of the articles, nor did he ask for their interrogation on the subject. We are of the opinion from our examination of the record that the guilt of the defendants is well established and under the particular facts and circumstances here involved, including the contents of the articles described, and the instruction given by the court directing the jurors "wholly to disregard" anything which contrary to the court's admonitions they may have read, seen or heard concerning the case, we are not disposed to say that there was error requiring reversal for a new trial.

We regard in the same light the District Court's denial of a motion for a new trial predicated upon similar references to Coduto in additional newspaper articles appearing during the trial, and furthermore, the failure of the defendants to call these articles to the attention of the trial court during the course of the trial precludes their urging the matter for the first time on a motion for a new trial. *Langer* v. *United States*, 8 Cir., 76 F. 2d 817, 827-828.

Defendants' contention of error with respect to denial of access to the grand jury's minutes of McNeal's testimony is totally devoid of any merit. No attempt was made to show "a particularized need" which would outweigh the policy of secrecy. *Pittsburgh Plate Glass Company* v. *United States,* 360 U. S. 395, is dispositive of this issue. The sole reason advanced for such inspection is that informer McNeal was a "disreputable witness". Certainly the character of the witness in and of itself does not demonstrate the particularized need referred to in *Pittsburgh.* And the record does not show that the request was made for the purpose of impeachment. Nor was a request made that the trial court examine McNeal's grand jury testimony *in camera* as was requested in *United States* v. *Hernandez,* 2 Cir. 282 F. 2d 71.

Defendant Coduto urges that the District Court by its actions and conduct displayed antagonism toward him which prejudiced him in the eyes of the jurors. In our opinion none of the specific complaints in this respect are such as would demonstrate that the conduct complained of was intended or calculated to disparage the defendant in the eyes of the jury or to prevent the jury from exercising an impartial judgment on the merits. *Goldstein* v. *United States,* 8 Cir., 63 F. 2d 609. We are satisfied that when the criticisms advanced are considered in connection with the entire record they are of minor significance and that no substantial rights of the defendant were impaired. See *United States* v. *Glasser,* 7 Cir., 116 F. 2d 690, 704-705, and *Glasser* v. *United States,* 315 U. S. 60, 83.

We have examined the instructions given and are of the opinion that when they are considered as a whole the jury was properly and adequately instructed. The particular instruction given on credibility together with the instructions on impeachment of witnesses and expectation of reward for testimony were such that there was no error

in rejecting an additional instruction on informer testimony. Under the facts there was no error in the refusal to give the tendered instruction on alibi. Nor in our judgment was there reversible error in refusing the instruction tendered concerning explanation of flight.

Defendant Coduto's contention that the sentence imposed upon him is cruel and unusual is without merit. The sentences imposed were within the penalties prescribed by Congress for the offenses involved. See *Smith* v. *United States*, 10 Cir., 273 F. 2d 462. They were neither cruel nor unusual.

Defendant Baker filed a motion to suppress certain evidence which was taken from his person by city police officers following his arrest on the morning of August 20th. The evidence sought to be suppressed was two fifty-dollar bills which were part of the funds advanced to McNeal. The basis of the motion to suppress was that the arrest and subsequent search and seizure were illegal and in violation of Baker's constitutional rights. Baker was arrested by investigator Turnbou and city police officer Tracy. The record of the suppression hearing establishes that Turnbou and Tracy had reasonable grounds and probable cause for making the arrest. That information relied upon in this connection was supplied by informer McNeal does not disqualify it as a basis for probable cause. *United States* v. *Walker*, 7 Cir., 246 F. 2d 519. The search and seizure followed a legal arrest and consequently there was no error in the District Court's refusal to suppress the evidence.

The judgments appealed from are affirmed.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX III.

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS

(Entered November 17, 1960)
Cause No. 12847

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgments of the said District Court in this cause appealed from be and the same are hereby affirmed in accordance with the opinion of this Court filed this day.

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MAR 17 1961
JAMES R. B

No. 726

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRED CODUTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. II, pp. 35-43) is reported at 284 F. 2d 464.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1960 (Pet. App. III, p. 45). A petition for rehearing was denied on January 17, 1961. The petition for a writ of certiorari was filed on February 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's request for a transcript of testimony of a witness before a grand jury was properly denied.

2. Whether newspaper articles published prior to the actual commencement of testimony required the declaration of a mistrial.

3. Whether petitioner was accorded a fair trial.

4. Whether petitioner's sentence is reviewable as excessive.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Seventh Circuit affirming the judgment of the District Court for the Northern District of Illinois. The district court, upon the verdict of a jury, had adjudged petitioner guilty of narcotics offenses on August 18 and 20, 1958, and of conspiracy, from August 8 to August 20, 1958, to commit these and other narcotics offenses (R. 20-23, 25-27).[1] Petitioner was fined $20,000, and sentenced to 20 years' imprisonment on each of counts 5 and 7, the sentences to run consecutively, with concurrent sentences of 20 years on the other three counts in which he was named (R. 25-27).

The testimony for the government, disclosing petitioner's association with Frye, Baker, and the informer McNeal, and petitioner's direct participation in the sale of narcotics to McNeal, was given by McNeal and by law enforcement officers who observed some of McNeal's telephone conversations and meetings. Fluorescent powder was found on petitioner after his arrest,

[1] "R." refers to the "Appendix for Defendants-Appellants" in the court of appeals.

such powder having been placed on currency supplied McNeal for payment for the narcotics (R. 130-131, 183, 197-198, 203-204, 226-227). Three officers testified to petitioner's flight when they sought to arrest him at his home (*e.g.*, R. 201-202, 208-209).

Particular matters relating to contentions made by petitioner are discussed in the Argument.

ARGUMENT

The judgment below is a correct application of established principles to a particular factual situation, and no conflict of decisions is involved. Review by this Court is therefore unwarranted.

1. During McNeal's testimony, petitioner asked whether the government had taken any statements from McNeal. Government counsel stated that the witness had testified before the grand jury. Without requesting the trial judge to examine the grand jury minutes first, defense counsel thereupon asked for the production of those minutes, stating that it was a matter of discretion "where it appears that a miscarriage may result," and that a miscarriage of justice "could come from a disreputable witness such as this" (R. 97). The motion to turn over the minutes was denied (R. 98).

Since counsel made no request that the court examine the grand jury minutes, the present case is governed by this Court's decision in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 401. Petitioner was not entitled to the grand jury minutes as a matter of right, and he showed no "particularized need" for the minutes. The fact that McNeal had a criminal record and was an informer might well have supported the

epithet "disreputable," but petitioner pointed to nothing in McNeal's testimony which would have indicated to the trial judge that McNeal's testimony before the grand jury was different from his later testimony at the trial.[2]

Since petitioner did not request an examination of grand jury testimony by the judge, the decisions as to which he asserts a conflict (Pet. 8-12) are inapposite, for they relate to a trial judge's duty to act on a specific request that the judge himself examine the minutes. Absent such a request, that issue is not presented on review. *Pittsburgh Plate Glass Co. v. United States, supra*, 360 U.S. at 401.

2. After a jury had been selected, but before any testimony had been adduced, petitioner made a motion for a new trial and for postponement of the case to a future time because of radio broadcasts and newspaper articles relating to the case (R. 51-53). The

[2] The correction of an "untruth," to which petitioner now adverts in the petition (Pet. 6-7), was merely a matter of government counsel, in chambers, correcting an apparent incorrect statement by McNeal denying that he had spoken with government counsel prior to taking the stand. McNeal's denial did not relate to anything that he could have stated inconsistently before the grand jury since the talks patently were those occurring after the grand jury proceedings (R. 104-105). Moreover, the witness' misunderstanding was later clarified as an assumption that he had only been asked whether anyone told him "how to testify" (R. 107). In any event, the incident occurred *after* the request for the grand jury testimony and was not before the judge at the time of the ruling, or raised again after its occurrence.

Similarly, the testimony at R. 101-102, sought to be relied upon by petitioner (Pet. 12) shows, not inconsistency, but consistency, between McNeal's testimony at the trial and before the grand jury: "Today is not the first time that I have ever mentioned that I saw a car pull up in front of the Oldsmobile * * *. The first time that I mentioned it was in front of the Grand Jury" (R. 102).

articles quoted referred to the selection of the jury, named the defendants on trial, and summarized the charges. The one in the Tribune referred to the fact that petitioner was reputed to be a "key figure" in the narcotics traffic and that he was under suspension from his job as a truck loader for the Sanitation Department. The article in the American referred to the reputation of petitioner as "Mr. Big" and to the fact that his trade was said to be a million dollar a year business. The district court denied petitioner's motion (R. 53).

To a major extent, the articles were factual and colorless. To the extent that they contained information not in the charge, they told the jury nothing that was not implicit in the evidence that was bound to be produced before the jury. Although the evidence at trial did not purport to indicate the full extent of petitioner's narcotics traffic, the evidence did show that petitioner dealt in $4700 worth of narcotics with one person in a 10 day period, and that he was the source of supply for the others (R. 64, 71; see Pet. App. II, p. 39). Thus in contrast to *Marshall* v. *United States*, 360 U.S. 310, and the other cases on which petitioner relies,[3] the articles here did not contain information which would have prejudiced petifioner.

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[3] Petitioner's citation of allegedly conflicting decisions in the Sixth Circuit (*Marson* v. *United States*, 203 F. 2d 904, and *Briggs* v. *United States*, 221 F. 2d 636), is misconceived. In *Marson*, the newspaper referred to long police records (203 F. 2d at 909) and in *Briggs* to an expression of the judge strongly suggesting that testimony for the defendant was the result of improper conduct (221 F. 2d at 639).

Moreover, there was no showing that any juror ever read or was acquainted with the articles; nor did counsel ask for any interrogation of the jurors on the subject (Pet. App. II, p. 41).

Finally, at the conclusion of the trial, in the introduction to his instructions, the trial judge told the jury that at "the beginning of this trial, and from time to time during the course of the trial, I have instructed you to refrain from discussing this case, from permitting anyone to discuss it with you, from reading anything that might be said in the newspapers concerning it, and from listening to anything that might be said over the radio or television concerning it. I assume that you have obeyed these instructions" (R. 339). He further specifically told the jury that they were to decide the case only on the evidence received in court under the instructions of the court and that, if they had heard or observed anything else, it was to be wholly disregarded (R. 339). Under all these circumstances, as the court of appeals below held, the denial of the motion for a mistrial was well within the area of the trial judge's discretion (Pet. App. II, p. 41).

3. Petitioner seeks to cumulate an alleged "combination of errors" as depriving him of a fair trial (Pet. 2). The matters relied upon, however, are exercises of conceded discretion by the trial judge and, in the context of the entire record, involve no abuse of discretion.

(a) The trial judge properly permitted cross-examination of petitioner as to his financial resources. In the face of testimony that petitioner was the head man

of an operation in narcotics transactions with one customer, amounting to $4700 in a 10 day period (R. 64, 71), petitioner had taken the stand and testified that he was a loader on a city garbage truck (R. 297). This, and his other testimony indicating very modest circumstances, would, absent impeachment, indicate inability to finance the size of the operations attested to by the government witnesses. It was, accordingly, pertinent and proper to cross-examine with respect to petitioner's other dealings in large sums, irrespective of whether the jury might draw inferences unfavorable to him from his attempted explanations that thousands of dollars had come to him from unspecified wagers (R. 307-308), from "life savings" (R. 309), and from his father before his death (R. 319), and that large sums exchanged at a bank were from someone else (R. 310-311). See *United States* v. *Lawinski*, 195 F. 2d 1, 7 (C.A. 7); *United States* v. *Jackskion*, 102 F. 2d 683, 684, certiorari denied, 307 U.S. 635.

(b) Contending that the trial judge displayed antagonism toward him (Pet. 19), petitioner combs four incidents from the record of this extended trial. The first was a mere inquiry by the judge as to whether petitioner's cross-examination of a witness had not been gone over before. The record here indicates that petitioner's questioning was repetitious and extremely detailed (R. 110-111), but that, after the judge's attempt to expedite the proceeding, petitioner was permitted to go on, in his own pace and detail, without further suggestion as to his manner of cross-examination (R. 111-114).

A second incident arose out of petitioner's effort to

seize upon a witness' answer that he saw the driver of a car but was not able to "identify" him "at that time" (R. 119-120). Petitioner sought to "object" to the witness' later testimony that he saw the same driver on a later date, and the trial judge merely pointed out that the witness "knew who it was. * * * He saw him but he could not identify him until later" (R. 132-133). The observation was a temperate ruling on an effort of petitioner to inject argument into the middle of testimony. It was further clarified to the jury by a specific caution, shortly thereafter, that remarks of the judge to counsel were not to be taken by the jury to affect their weighing of the evidence (R. 141).

Petitioner complains, further, that the trial judge read documents at times during the testimony of defense witnesses. The judge assured petitioner that he had heard the testimony fully and, at a later time, pointed out that he was merely selecting the jury instructions in the interest of saving time (R. 298-299, 305). Moreover, the judge instructed the jury fully that he had not intended, at any time during the trial, to express any opinion on any matter of fact, and that, if there had been any such expression, the jury was to disregard it (R. 340).

Lastly, petitioner complains of the fact that, upon denial of his motion for a new trial, the trial judge had been prepared in advance with a written opinion. The complaint is fully answered by the statement of the judge, "I had two statements prepared, one to set the verdict aside, which didn't justify itself, and the other one." (R. 359).

(c) Petitioner now complains of the failure to give several requested instructions (Pet. 22-27), but he

failed to make objection, as required under Rule 30, F.R. Crim. P., when the instructions, sometimes in different form, were given to the jury (R. 356) and there would still have been time to make clarifications, if such had actually been required. With respect to petitioner's flight when law officers sought to arrest him, the court gave full instruction (R. 353-354). There was no need for further instructions as to petitioner's self-serving testimony that he had thought the officers to be robbers, especially in the face of the conceded fact that he had not reported the incident to the police, although his route was within three blocks of a police station, but had remained away from his home and came to the police for the first time with his lawyer and bondsman (R. 313-314).

(d) Petitioner complains (Pet. 24-26)—again without seasonable objection made under Rule 30, F.R. Crim. P.—of the failure of the court to give a separate instruction as to a possible alibi. Petitioner alone testified to being elsewhere at the time of the narcotics transactions and, except for his general denials of guilt, his statements as to being elsewhere were unprecise as to the time elements and did not preclude brief, undetectable excursions to the various meeting places (*e.g.*, R. 300). Upon the record, an instruction as to alibi was not necessary and might well have been confusing.

(e) Similarly without seasonable objection under Rule 30, F.R. Crim. P., petitioner now complains of failure to give a special instruction tendered earlier regarding an informer's testimony (Pet. 27). The complaint is answered by the instructions that were given on expectation of reward for testimony (R. 343)

and on credibility and impeachment of witnesses (R. 340-341, 343).

4. Petitioner would have this Court review his sentence as excessive (Pet. 28). Federal appellate courts are without such power of review where the sentence is within the statutory limits. See *Gore* v. *United States*, 357 U.S. 386, 393; *Brown* v. *United States*, 359 U.S. 41, 52; *Smith* v. *United States*, 273 F. 2d 462, 467-468 (C.A. 10), certiorari denied, 363 U.S. 846.

In the present case, sentences on all counts were concurrent sentences of 20 years, except that the sentence on count 7, relating to the sale of 3687 grains of heroin on August 20, 1958, was made consecutive to that relating to sale of 386 grains on August 18, 1958. The trial judge, adverting to the clear inclination of Congress toward severity as to narcotics offenses (R. 23), could not have been unimpressed by sales of more than $4,700 of narcotics to a single buyer within ten days.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1961.

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FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 726

FRED CODUTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

MOTION OF PETITIONER TO STRIKE PORTION OF BRIEF FOR THE UNITED STATES IN OPPOSITION

AND

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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MOTION OF PETITIONER TO STRIKE PORTION OF BRIEF FOR THE UNITED STATES IN OPPOSITION

Now comes FRED CODUTO, Petitioner herein, by Charles A. Bellows, his attorney, and respectfully moves the Court to strike the portion of the Brief for the United States in Opposition, to wit: the first phrase of the sentence commencing on page 5 of said Brief, line 16, as follows:

> Although the evidence at the trial did not purport to indicate the full extent of petitioner's narcotics traffic, • • •.

For the reason that said phrase is not supported by the evidence contained in the record in this case and is scandalous.

CHARLES A. BELLOWS
Chicago, Illinois
Attorney for Petitioner

IN THE

Supreme Court of the United States

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No. 726

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Respondent.

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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

1. The Government's answer to the petitioner's first point concerning the production of the minutes of the grand jury for the purpose of impeachment, is based upon two premises, neither of which are supported by the prevailing case law. The first premise is that "petitioner pointed to nothing in McNeal's testimony which would have indicated to the trial judge that McNeal's testimony before the grand jury was different from his later testimony at the trial." The leading case on the question of the production of grand jury minutes, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, specifically states that:

> • • • Petitioners indicate that the trial judge required a showing of contradiction between [the witness] Jonas' trial and grand jury testimony. Such a preliminary showing would not, of course, be necessary. (360 U.S. 395, 400-401)

The manifest unfairness of the Government's position is at once obvious. The Government is in effect saying: "We will not show you the minutes, but tell us where they are inconsistent with the trial testimony of the witness." This position would require the defendant or his counsel to be gifted with extrasensory perception.

The second premise upon which the Government's objection is based is that the petitioner made no specific request that the trial judge inspect the minutes of the grand jury in camera. In support of this premise, it again cites the *Pittsburgh Plate Glass Co.* case. There is no such holding in that case. There the petitioners asserted an absolute right to have access to the grand jury minutes, and upon that narrow question the Court held that there was no such absolute right, saying: (360 U.S. 395, 401)

> • • • The short of it is that in the present case the petitioners did not invoke the discretion of the trial judge, but asserted a supposed absolute right, a right which we hold they did not have.

In the present case the motion of the petitioner for access to the grand jury minutes of the witness was addressed to the discretion of the trial court. The questions which we now present are whether the trial court may summarily deny such a motion or must it first inspect the minutes, and must the petitioner specifically request that the trial court inspect the minutes. We know of no case which holds that such a request for inspection must be made. *Pittsburgh Plate Glass Co.* does not, nor has the Government cited anything but some dicta in that case in support of the proposition. In fact, the Second Circuit, the Circuit in which most of the cases concerning this problem have arisen, apparently makes no distinction between an outright

request for access to the grand jury minutes and a request that the trial court inspect the minutes in camera. In that Circuit the rule is seemingly that no matter what the form of the request is, the duty devolves upon the trial court to inspect minutes of the grand jury for the purpose of discovering impeaching matter. See, *e.g. United States* v. *Spanglet*, 258 F. 2d 338; *United States* v. *H. J. K. Theatre Corporation*, 236 F. 2d 502. Although this is not a brief on the merits of the case, it must be urged that the rule of the Second Circuit ought to be established for all circuits, lest Federal jurisprudence in this area degenerate into a form of sorcery in which the magic words must be uttered in the proper manner or else the defendant's right shall be denied.

The Government states that a particularized need is necessary for the production of the grand jury minutes. The purpose for the motion of the petitioner in the trial court was to obtain impeaching material for use in cross examining the witness. This was apparently understood by all participants in the trial. This matter is fully set forth in our petition and does not require reiteration here. (Pet. 7-8) The use of the grand jury minutes for impeachment constitutes the particularized need and this Court recognized this fact in its initial discussion on the problem. In *United States* v. *Procter & Gamble Company*, 356 U.S. 677, 683, this Court said:

> • • • We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like. *Those are cases of particularized need* where the secrecy of the proceedings is lifted discretely and limitedly. (Emphasis added)

Hence the use of the grand jury minutes for impeachment is of itself the particularized need required by this Court.

2. In answer to our second point that it was the duty of the trial court to make an inquiry to determine whether or not the jury had knowledge of certain prejudicial articles appearing in the newspapers, the Government has replied that the articles were not prejudicial. The articles in question called the petitioner a "key figure in the narcotics traffic" and contained a statement of the chief investigator for the Cook County, Illinois, State's Attorney, that the petitioner was "Mr. Big in local narcotics" and that the investigator called the petitioner's "dope trade a million dollar a year business."

There was no such evidence introduced. The Government, mounting inference upon inference, would have this Court believe that because the evidence showed that the petitioner dealt in $4700 worth of narcotics with one person in ten days his sales for one year would amount to one million dollars. Aside from the fact that the Government's arithmetic is faulty, there was no evidence introduced at any time, either in the Government's case before the jury, or in aggravation, that the petitioner was ever connected with narcotics sales other than those charged in the indictment. The statement in the Government's Brief in Opposition that the "evidence at the trial did not purport to indicate the full extent of the petitioner's narcotic traffic" (Br. in Opp. 5) has absolutely no basis in the record of this case, is scandalous and ought to be stricken; and we have herewith filed a motion asking for that relief. The Government has been as influenced by the content of the newspaper articles as the jury could have been and as the trial judge was when he sentenced the petitioner, saying that the petitioner was a "wholesale supplier" of heroin. (Pet. App. I, p. 31)

The material contained in the articles being of such a prejudicial nature, the trial court should not have summarily overruled petitioner's motion for a mistrial. The Government has not answered our brief on this point and we therefore shall only refer the Court to our brief which contains all our arguments on the matter.

3. & 4. To answer the Government's brief on points 3 and 4 would require that we set out all the arguments contained in our petition. Therefore we shall not presume upon the Court to do so. However two observations must be made.

The Government contends in opposition to point 3 that petitioner did not raise a proper objection to the instructions complained of. The record shows that a conference was held among the judge and the attorneys for all parties for the purpose of settling the instructions. At that time, which was before the jury retired to consider its verdict, counsel for the petitioner was given the instructions which the court proposed to give. He made his objections and requested that certain instructions be given. The court refused. The matter was assigned on appeal. The Government raised the same point as here that the objection should have been made after the jury was instructed. There is no such requirement in Rule 30 of the Rules of Criminal Procedure. The rule merely requires that the objection to the charge be made "before the jury retires to consider its verdict." The objection was made before the jury retired. The Court of Appeals apparently thought so little of the contention which the Government now makes that it ignored it completely.

The second observation which concerns point 4 is that this Court has reviewed sentences imposed in lower federal courts and has reversed where the sentence has been found excessive. *Yates* v. *United States*, 356 U.S. 363.

Respectfully submitted,

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FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 726

FRED CODUTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. EAkview 5-6581

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Fred Coduto, Petitioner in the above entitled cause prays that this Court grant rehearing of its order of April 17, 1961, denying the petition for writ of certiorari, ... U. S. ....., and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case as prayed for in the petition filed February 15, 1961, herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. The sentence of the United States District Court for the Northern District of Illinois, Eastern Division, in this cause, is void for failure of the District Judge to comply with the provisions of Rule 32 of the Federal Rules of Criminal Procedure in that he failed to afford either the petitioner or his attorney the opportunity to present matter in mitigation of sentence. This fact was recognized by the Assistant United States Attorney who prosecuted the case; for, after sentence was imposed, he moved the court to set aside the sentence and afford the petitioner the opportunity for presenting matter in mitigation. (Transcript of Proceedings, page 1514 *et seq.*)

As recently as February 27, 1961, this Court reaffirmed the rule that the defendant in a criminal case must be afforded a right to make a statement in mitigation. *Green* v. *United States,* ..... U.S. ....., 81 S. Ct. 653. In the *Green* case the Court found that the defendant had been given the opportunity. In the present case there is no doubt but that the petitioner was not afforded the opportunity to make a statement in mitigation. Nor was his attorney given the opportunity. These facts must be admitted by the Government for it was the Government's attorney who prosecuted the case who made the following motion after sentence had been imposed:

> By Mr. Montgomery: Your Honor, this is the Government's motion that I am making for the reason that when the defendants were sentenced, they were not afforded an opportunity in their own persons or by their counsel to make a statement before imposition of sentence . . . (Transcript of proceedings, page 1514)

The sentence imposed was forty years consisting of two consecutive twenty year sentences. The defendant is not eligible for parole under the law as the offense was for

violation of the narcotics laws. The evidence introduced at the trial showed that the petitioner was a man of prior good reputation in the community for being a peaceable and law abiding citizen. (Transcript of Proceeding, pages 1083-1091) Had he been given an opportunity to be heard the judgment and the sentence of the court could have been different.

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

.....

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Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

.....

Attorney for Petitioner